Supreme Court, U.S.
FILED
NOV 3 1994

No. 94-621

In The

Supreme Court of the United States

October Term, 1994

SPARTANBURG STEEL PRODUCTS, INC.,

Petitioner,

v.

HAROLD E. CONSTANT,

Respondent.

Petition For A Writ Of Certiorari To The South Carolina Supreme Court

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

IN A STATE IN WHICH THERE IS NO RIGHT TO SEQUESTRATION OF WITNESSES DOES A CORPORATE PARTY REQUESTING DISCRETIONARY SEQUESTRATION HAVE A DUE PROCESS RIGHT TO HAVE AS ITS REPRESENTATIVE A FORMER EMPLOYEE WHO WILL BE A FACT WITNESS IN THE TRIAL?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING CERTIORARI 2

I. There is no due process right of a corporate party litigant to designate as a courtroom representative a fact witness who at the time of trial, lacks an officer or employment relationship to the corporation, particularly when it seeks discretionary sequestration of witnesses. 2

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Bloudell v. Wailuku Sugar Co., 699 P.2d 163 (Haw.App. 1983) 10

Bobbitt v. Allied-Signal, Inc., 639 A.2d 142 (1994) 7, 8

Cooper v. United States, 594 F.2d 12 (4th Cir. 1979) 7

Dyson v. Ferncliff Properties, Inc., 696 S.W.2d 767 (1985) 9

In Re Christopher A., 578 A.2d 1092 (Conn.App. 1990) 8

Jefferson-Western Corp v. Chefas, 670 P.2d 431 (Colo. Ct.App. 1983) 9

Marathon Pipe Line v. Drilling Rig Rowan/Odessa, 699 F.2d 240 (5th Cir. 1983) 10

Martin v. Burchman, 203 S.W.2d 807 (Tex. Civ.App. 1947) 9

Mississippi Rice Growers Ass'n v. Pigott, 191 So.2d 399 (Miss. 1966) 10, 11

Morton Buildings, Inc. v. Rezultz, Inc., 603 A.2d 946 (N.J. 1933) 7, 9

Safeway Stores, Inc. v. Watson, 562 A.2d 1242 (1989) 7

State v. Boyd, 341 S.E.2d 144 (S.C.App. 1986) 6

State v. Jackson, 217 S.E.2d 794 (S.C. 1976) 6

Tull v. United States, 481 U.S. 412 (1986) 4

U.S. v. Bramlet, 820 F.2d 851 (7th Cir. 1987) 5

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION, RULES AND STATUTES

U.S. Const. amend. VI 4

Fed. R. Evid. 615 ..... 3, 7, 8, 9, 10

Maryland Rule 2-513 8

STATEMENT OF THE CASE

This slander *per se* action was commenced by Harold Constant on February 1, 1991, against Spartanburg Steel (hereinafter SS). The action was based on an agent of SS falsely accusing Mr. Constant of stealing a welder. SS asserted the truth and qualified privilege as defenses. Trial was held in Spartanburg County before Circuit Court Judge Victor Pyle, Jr., and a jury on November 9-13, 1992.

Before any testimony was heard, SS moved to have all witnesses sequestered. The court granted this motion. On November 10, 1992, SS moved to have the sequestration lifted as to a former employee, Maurice Salmon, claiming him to be the corporation's trial representative, and arguing that by sequestering him, SS, the corporate party, would be excluded from the proceedings. The court denied this motion and asked if SS would like to withdraw its motion to sequester the witnesses. SS declined to withdraw its motion to sequester. The trial court further asked if SS would like to designate its president to be the corporations' representative for trial. Again, SS refused.

On November 13, 1992, the jury returned a verdict for the Plaintiff for $400,000.00 actual damages and $100,000.00 punitive damages. SS moved the court for a judgment notwithstanding the verdict and a motion for a new trial based on several alleged errors of the trial court. SS appealed the trial court's denial of these motions to the South Carolina Supreme Court. In its affirmance of the verdict the Court noted these facts:

> SS fired Mr. Constant for failing to cooperate in its investigation of a missing welding machine.

After independent contractors Clarkson Brothers, Inc. (Clarkson) and Compleat Machine (Compleat) finished working at SS, as was common practice, a welding machine was left on site. At Mr. Constant's direction, the machine was picked up from SS by a Compleat employee. When SS realized the machine had been removed from its property, it began an investigation concerning the removal of the machine. SS asserted the machine belonged to Clarkson. Despite repeated assurances from Clarkson that it was not missing a welding machine, SS continued its investigation during which it contacted the owner of Compleat and communicated respondent was a "thief" and had stolen the machine.

REASONS FOR DENYING CERTIORARI

I. There is no due process right of a corporate party litigant to designate as a courtroom representative a fact witness who at the time of trial, lacks an officer or employment relationship to the corporation, particularly when it seeks discretionary sequestration of witnesses.

The question presented in Spartanburg Steel's Petition for Certiorari does not implicate Spartanburg Steel's right to due process and the Petition should therefore be denied. The issue presented by SS derives from the following facts:

1. There is no right to sequestration in South Carolina trial court procedure. SS moved the trial court for an order of sequestration

which is purely within the sound discretion of the trial court.

2. The trial court granted SS's motion to sequester but would not allow it to designate as its corporate representative at trial a retired individual employee, Maurice Salmon, who was to be a witness in the trial.

3. The trial court gave SS the option to bring in a proper corporate representative or to withdraw its request for sequestration.

SS's effort to invoke the Due Process Clause because of its absence from the courtroom, derives from its own volitional acts in electing to proceed with sequestration which is discretionary, knowing it would result in exclusion of Maurice Salmon, and in selecting former employee Maurice Salmon as its courtroom representative, and refusing the trial court's invitation to designate another individual as its representative from among its officers and employees, or to withdraw its motion.

In its efforts to elevate to constitutional magnitude the issues surrounding Salmon's exclusion from the courtroom pursuant to the sequestration order which was obtained on motion of SS, SS attempts to invoke the Sixth Amendment Confrontation Clause from criminal law; argues a party's right to be present at trial; references "related rights which stem from the right to be present at trial"; argues that a corporation has the same right to be present at trial as an individual, and borrows from Rule 615 Fed. R. Evid. to make the point that a corporation is entitled to be present at trial and the trial court's sequestration of Maurice Salmon deprived SS of that right. All of these arguments notwithstanding, SS has

only raised a question of whether or not a party can circumvent discretionary sequestration by naming as its representative a fact witness with no official relationship with the party. Due process is not implicated.

A. Irrelevancy of Issues Raised by SS

In advancing its due process argument, SS raises the criminal defendant's right under the Sixth Amendment to confront witnesses. Although that right is beyond challenge, SS's reliance upon that right is misplaced, because the Confrontation Clause is by its terms applicable only to criminal prosecutions: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Constitution, Sixth Amendment. See also *Tull v. United States,* 481 US 412 (1986). (Sixth Amendment relates to prosecutions which are strictly criminal in nature). The Sixth Amendment, therefore, has no relation to the case at bar.

From the Confrontation Clause, SS proceeds to argue that a party has "the right to be present in civil cases" calling it "a presumed constitutional right". The right of a party to be present at trial, however, relates only to a part of the election made by SS, at the time of sequestration. SS chose sequestration of witnesses, knowing that its preferred designee would also be excluded and thereafter declined to bring another corporate representative.

The next step in SS's progression involves discussion of rights related to or deriving from the right to be present at trial. Those identified by SS include the right to assistance of counsel; the right to be physically present, competent and to understand; the right to confront witnesses; and the right of a party, the press and the public

of access to trials. Again, while these are all rights which have been recognized as belonging to persons in this country, they have no relation to the decision to exclude Maurice Salmon from the courtroom under the sequestration order and are irrelevant to the Court's consideration of the Certiorari Petition.

SS also argues that a corporate party has the same right to be present at trial as does an individual party.[1] Of course, a corporation has a right to be present. However, SS has cited no authority for the proposition that it has a constitutional right to do so other than through an officer or employee. Unfortunately, SS elected sequestration with full knowledge that Salmon would be excluded. Nevertheless, SS presumes that, since it desired to have Maurice Salmon as its courtroom representative, the court's sequestration of Salmon amounted to exclusion of SS from the courtroom. Manifestly, this was not the case. To the contrary, when Salmon was excluded from the courtroom in accordance with the sequestration order which SS had requested, the trial judge offered SS the opportunity to have someone else be present in the courtroom for the remainder of the trial or to withdraw its motion to sequester. SS declined.

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[1] SS complains that Constant, the plaintiff, remained in court throughout trial and testified as a rebuttal witness. Mr. Constant testified first, so there was no reason for him to be sequestered; and sequestration does not normally apply to rebuttal witnesses. *See U.S. v. Bramlet*, 820 F.2d 851 (7th Cir. 1987).

B. The True Issue: Does a Party who seeks Discretionary Sequestration of Witnesses have a Constitutional Right to have one of its trial witnesses, a former employee, as its Corporate Representative

The South Carolina Supreme Court upheld the sequestration of Salmon because, as a former employee, he was not an appropriate corporate representative.

It is crucial to note that, in South Carolina, which has no state counterpart to Rule 615, Fed. R. Evid., sequestration is not a right but is discretionary with the trial court. *State v. Boyd*, 341 S.E.2d 144 (S.C.App. 1986). "Granting or refusing of a motion to sequester witnesses is within the sound discretion of the trial judge". *State v. Jackson*, 217 S.E.2d 794 (S.C. 1975). Thus, when a corporate party, such as SS makes a motion for sequestration of witnesses, it is entirely up to the trial court whether sequestration should be ordered and upon what grounds. A party in state court has no right, whether constitutional, statutory or otherwise, to have witnesses sequestered.

Consequently, when a corporate party which has requested sequestration is informed that the person designated to be the party's courtroom representative must also be sequestered, since he is a witness who is neither an officer nor an employee, that party is presented with a choice: it may choose sequestration, knowing that it will result in exclusion of the person designated; or, it may withdraw its sequestration request or substitute another representative who would not be subject to sequestration.

Clearly, when a party faces and exercises choices in accepting discretionary sequestration, the party's election

of sequestration, as a volitional act, cannot form the basis for a claimed denial of due process.[2]

Even assuming, arguendo, that sequestration of witnesses is a right, which clearly it is not in South Carolina, SS contends that it, alone, should choose whom it wishes to designate, rather than the trial court or the opposing party.[3] SS attempts to support a virtually unfettered right to designate a representative through two cases from the Maryland Supreme Court which required that a corporation's designee not be excluded under a sequestration order. See *Safeway Stores, Inc. v. Watson*, 562 A.2d 1242 (1989) and *Bobbitt v. Allied-Signal, Inc.*, 639 A.2d 142 (1994). In both *Safeway Stores* and *Bobbitt*, the Maryland Supreme Court rulings allowed for corporate designees who were not, at the time of trial, officers or employees of the corporations in accord with a then existing state rule,

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[2] Even if it was error to exclude defendant's witness, Petitioner did not show any prejudice as a result of the trial court's discretion. In *Morton Buildings, Inc. v. Rezultz, Inc.*, the Court stated that:

> Although the trial court would have been better advised not to sequester both of Rezultz's officers, the error does not compel reversal . . . nothing suggests that Rezultz was prejudiced by its attorney's lack of access to the witnesses.

603 A.2d 951 (N.J. 1992).

In this case Petitioner does not show any prejudice.

[3] While Rule 615 Fed. R. Evid. does make exclusion ordinarily a matter of right, the trial judge still retains a measure of discretion in the application of the exceptions to the rule. *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979).

and not as a result of any constitutional requirement.[4] At the time of decision of both cases, Maryland Rule 2-513 provided *inter alia:*

> (a) Exclusion – On motion of any party made before testimony begins the court shall order that witnesses other than parties be excluded from the courtroom before testifying, and it may do so on its own initiative or on motion of any party made after testimony begins . . . A party that is not a natural person may designate a representative to remain in the courtroom, even though the representative may be a witness . . .

Rule 2-513 was replaced by Rule 5-615 with an effective date of July 1, 1994, and which provides in pertinent part:

> (b) Witnesses not to be Excluded – A Court shall not exclude pursuant to this Rule . . .
>
> (2) An officer or employee of a party that is not a natural person designated as its representative by its attorney.

As part of its consideration of *Bobbitt* the Maryland Supreme Court alluded to the effect of the new Rule in concluding its Footnote 3 "this Rule may restrict the class of persons who may be designated as representatives of a party". These cases offer no support to SS. SS's argument

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[4] The rule against exclusion of a party is not absolute. "An occasion may arise where, to prevent a similarity of statements by witnesses, the court may exclude any witness, *including a party to the litigation,* from the courtroom, but this is a power to be sparingly exercised and only upon the clearest grounds so far as the party is concerned." *In re Christopher A.*, 578 A.2d-1092 (Conn.App. 1990).

would render unconstitutional on its face Maryland's new Rule 5-615 and for that matter Rule 615 Fed. R. Evid. since those rules do not permit the latitude in designation SS contends it has a right to.

Additionally, none of the other cases relating to the designee of a corporation, cited by SS involve a representative who is neither officer nor employee.[5] In fact, cases cited by SS support the position that a corporation's courtroom representatives must be current employees or officers. See *Morton Buildings, Inc. v. Rezultz, Inc.*, 603 A.2d 946 (N.J. 1992) (Holding that "an officer or employee of a corporation who is designated as the corporation's representative may not be sequestered"); and *Dyson v. Ferncliff Properties, Inc.*, 696 S.W.2d 767 (1985). (Rule recognizes exception to sequestration rule for "an officer or employee of a party that is not a natural person designated as its representative by its attorney").

Importantly, Rule 615, Fed. R. Evid., which SS seems to argue should be adopted or followed in South Carolina limits the pool of potential corporate trial representatives in similar fashion:

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[5] Cases that Petitioner cites do not support the proposition that a corporate party may designate a representative who is neither employee nor an officer.

In fact, *Martin v. Burchman*, 203 S.W.2d 807 (Tex. Civ.App. 1947) involves the limited rule that a witness who becomes the wife of a defendant cannot be excluded.

Also, *Jefferson-Western Corp. v. Chefas*, 670 P.2d 431 (Colo. Ct.App. 1983) involves witnesses who were officers of the plaintiff corporation but were not formally designated as representatives, and not a party to the action.

> "This Rule does not authorize exclusion of . . .
>
> (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney".

Rule 615, Fed. R. Evid.

Rule 615 has been interpreted as requiring that, in order to be excepted from sequestration, "the representative must be 'an officer or employee of a party which is not a natural person . . . ' ". *Marathon Pipe Line v. Drilling Rig Rowan/Odessa,* 699 F.2d 240, 242 (5th Cir. 1983). See also *Bloudell v. Wailuku Sugar Co.,* 669 P.2d 163, 169 (Haw.App. 1983) n.11.

South Carolina has no codified Rule on sequestration as a counterpart to Rule 615 Fed. R. Evid. Instead, case law provides the Rule. In affirming the trial court's sequestration of Salmon, the South Carolina Supreme Court noted that "[a]t the time of trial, however, Salmon was no longer employed by SS, and therefore was not a proper corporate representative." The rationale supporting this decision is set forth in *Mississippi Rice Growers Ass'n v. Pigott,* 191 So.2d 399 (Miss. 1966) cited by the South Carolina Supreme Court:

> The trial court was of the opinion that since Mr. Kimbriel was no longer an officer in the corporation, he could not represent it in the sense of making decisions or recommendations during the trial of the case, and was, therefore, simply a witness and should be excluded from the courtroom with the other witnesses.

Mississippi Rice Growers Ass'n v. Pigott, at 406.

Mr. Salmon, like Mr. Kimbriel in *Rice Growers* was simply a fact witness. SS wanted Salmon to have the

advantage of hearing the testimony of the other witnesses, an advantage SS took affirmative steps to deny the other trial witnesses.

Neither the Mississippi Supreme Court in *Rice Growers* nor the South Carolina Supreme Court in the case at bar, have invaded any due process rights of the corporate party to be present at trial. Spartanburg Steel proceeded through trial without a representative in the courtroom because SS chose to have no one present if Salmon were excluded.

When a corporate party declines to have any representative present in court because it desires as its representative, a former employee or other individual lacking any present official or employment relationship with the corporation, the lack of a representative is the product of the corporation's choice, rather than any deprivation of due process wrought upon the corporation. In essence, SS chose to have no representative present when Salmon was excluded. A party cannot make a conscious choice on a trial judge's discretionary ruling and then complain of a denial of due process.

CONCLUSION

Spartanburg Steel had no constitutional right to have as its corporate designee a trial witness that lacked officer or employment relationship to the corporation, and was properly excluded by the sequestration it sought.

Respectfully submitted,

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